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## Governmental Benefits Conditioned on the Relinquishment of Constitutional Rights

Victoria Rebecca Whelan  
*Suffolk University Law School*

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# GOVERNMENTAL BENEFITS CONDITIONED ON THE RELINQUISHMENT OF CONSTITUTIONAL RIGHTS

*" . . . [O]n the one hand, [it is] the very basis of a free society, that of the right of expression beyond the conventions of the day, and on the other hand, the freedom of society from constitutional compulsion to subsidize enterprise, whether in the world of matter or of mind."<sup>1</sup>*

## I. INTRODUCTION

Government subsidies, benefits, or grants, are subject to an inherent contradiction.<sup>2</sup> The government has a right to define the limits of their programs and the basis for awarding grants or subsidies.<sup>3</sup> Conversely, the government may not penalize individuals for exercising their constitutional rights.<sup>4</sup> Potential recipients of government grants have to

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<sup>1</sup> *Hannegan v. Esquire Inc.*, 327 U.S. 146, 160 (1946) (Frankfurter, J., concurring).

<sup>2</sup> See *infra* note 3 (noting government's right to define programs); *infra* note 4 (explaining government may not penalize person for exercising Constitutional rights). For the purposes of this paper, the term "benefits" includes subsidies, grants, tax breaks, or any other case in which the government provides privilege to the people, including the use of government property.

<sup>3</sup> See *NEA v. Finley*, 524 U.S. 569, 587-88 (1998) (recognizing greater government latitude in spending than in regulation); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 669 (1998) (holding public broadcaster's decision to exclude candidate from debate reasonable); see also *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 892 (1995) (Ginsberg, J., dissenting) (quoting *Rust v. Sullivan*, 500 U.S. 173 (1991) in holding that government may define its programs); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (commenting that government may define programs created with public appropriations); *Maier v. Roe*, 432 U.S. 464, 474 (1977) (upholding Connecticut's right to limit Title X programs concerning abortions); *Valezquez v. Legal Servs. Corp.*, 164 F.3d 757, 768 (2d Cir. 1999) (upholding some limitations on government program for legal services); *Legal Aid Servs. of Haw v. Legal Servs. Corp.*, 145 F.3d 1017, 1024 (9th Cir. 1998) (recognizing Congress' broad power to fund and define programs).

<sup>4</sup> See *Finley*, 524 U.S. at 600-01 (Souter, J., dissenting) (arguing government may not deny favors based on acceptability of speaker's views); *Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (stating statutes that financially burden speakers because of content inconsistent with First Amendment); *Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983) (acknowledging exer-

meet the conditions or restrictions the government places on these programs or subsidies such as not speaking of or performing abortions.<sup>5</sup> These conditions and restrictions may infringe upon Constitutional rights such as free speech.<sup>6</sup>

This note addresses how courts are dealing with this contradiction of limiting while not penalizing and proposes several arguments supporting potential recipients. Section II reviews the history of how benefits are structured, the problems inherent in that structure, and several factors that influence whether the benefit limitations are constitutional.<sup>7</sup> Section III reviews the current trends of the Court by examining some recent cases from the Supreme Court as well as the courts of appeals.<sup>8</sup> Section IV proposes several arguments in favor of potential subsidy recipients.<sup>9</sup> Finally, section V concludes with a look to the future of government benefit cases where the constitutionality of conditioned benefits are raised.<sup>10</sup>

## II. HISTORY

Government benefits exist in many forms, ranging from tax credits to direct monetary grants.<sup>11</sup> Generally, the government is under no

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cise of constitutional rights may not be basis for refusing recipient benefits); *Maher*, 432 U.S. at 487 (Brennan, J., dissenting) (commenting that infringement of rights occurs when exercise of those rights is made more difficult); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (forbidding government from denying benefit based on exercise of constitutional rights, especially speech); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding government unlawfully required unemployment recipient to choose between benefit and religion); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (commenting denial of benefit or tax exemption because of speech acts as penalty for speech). Cf. *Bella Lewitzky Dance Found. v. Frohnmayr*, 754 F. Supp. 774, 784-85 (C.D. Cal. 1991) (explaining government subsidies cannot violate vagueness standards).

<sup>5</sup> See *infra* note 16 (listing upheld conditions on recipient's behavior).

<sup>6</sup> See *infra* notes 17, 18 (listing unconstitutional behavior restrictions).

<sup>7</sup> See *infra* notes 11-42 and accompanying text.

<sup>8</sup> See *infra* notes 43-77 and accompanying text.

<sup>9</sup> See *infra* notes 78-109 and accompanying text.

<sup>10</sup> See *infra* notes 109 and accompanying text.

<sup>11</sup> See *Rust*, 500 U.S. at 200 (commenting government "subsidy" may be access to government-owned property); *FCC v. League of Women Voters*, 468 U.S. 364, 368-69 (1984) (discussing funding provided for public broadcasting); *Regan*, 461 U.S. at 542 (1983) (recognizing tax exemptions and deductions as forms of government subsidies); *Hannegan*, 327 U.S. at 151 (recognizing second class mailing privileges as subsidy);

constitutional compulsion to create most benefits.<sup>12</sup> Scarcity of resources mandate that the government exercise discretion when allocating benefits.<sup>13</sup> Moreover, the government is under no obligation to promote the exercise of constitutional rights.<sup>14</sup> The Court has recognized the government's right to define the limits of a benefit or program the government creates or funds.<sup>15</sup>

In defining a program or benefit, the government mandates participatory restrictions and conditions.<sup>16</sup> Often, potential recipients do not

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*Advocates for the Arts v. Thomson*, 532 F.2d 792, 795 (1st Cir.1976) (recognizing congressional funding of arts as subsidy).

<sup>12</sup> See *Rust*, 500 U.S. at 201 (commenting government not under duty to fund activity simply because activity is constitutional right); *Leathers v. Medlock*, 499 U.S. 439, 450 (1991) (explaining government need not fund First Amendment rights); *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989) (opining Due Process Clause of Constitution gives no right to government aid even if necessary for life, liberty, or property interests when government is not entity depriving individuals); *Regan*, 461 U.S. at 549 (reaffirming constitutionality of legislature not subsidizing fundamental rights); *Maher*, 432 U.S. at 469 (clarifying government under no requirement to provide any medical services to poor); *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring) (rejecting notion rights not realized unless subsidized). But see *supra* note 4 (citing denials equaling infringement); *infra* note 17 (listing unconstitutional limitations on subsidies).

<sup>13</sup> See *Finley*, 524 U.S. at 585 (recognizing art funding decisions require denying most applications); *Forbes*, 523 U.S. at 674 (noting nature of broadcasting facility necessitates promotion of one view over another); *Rosenberger*, 515 U.S. at 829 (recognizing government's necessity to limit forum); *Rust*, 500 U.S. at 194 (reasoning government funding of one program means discouraging alternative program); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting) (explaining impossibility of according all speech protection against exclusion from subsidies); *Maher*, 432 U.S. at 479 (reiterating competition for limited public funds justifies state's right to make choices); *Advocates for the Arts*, 532 F.2d at 796 (suggesting use limits on government property not applicable to art subsidies). But see *supra* note 4 (explaining constitutional arguments against government denying funding).

<sup>14</sup> See *supra* note 12 (discussing constitutional rights need not be funded); *infra* note 15 (explaining government's right to define subsidies); *infra* note 16 (providing examples of definitions on programs).

<sup>15</sup> See *supra* note 3 (noting government's right to define programs); *infra* note 16 (listing limitations on benefits that were upheld); *Cammarano*, 358 U.S. at 512 (explaining tax system may limit exemptions for lobbying expenses). But see *Speiser v. Randall*, 357 U.S. 513, 517 (1958) (noting California court required conditions on grants be reasonable).

<sup>16</sup> See *NEA v. Finley*, 524 U.S. at 572 (upholding statute requiring NEA to consider decency and respect); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676 (1998) (recognizing public broadcaster's right of editorial discretion to exclude candidate from televised debate); *Rust v. Sullivan*, 500 U.S. 173, 177 (1991) (upholding Title X limitations on abortion counseling); *Leathers*, 499 U.S. at 453 (upholding gener-

agree with these restrictions and regard them as penalties for, or barriers to, the exercise of their constitutional rights.<sup>17</sup> The central issue of government benefit cases is whether the limitation on the benefit unconstitutionally acts as a penalty on recipients for the exercise of their constitutional rights.<sup>18</sup> The potential recipients argue: "but for my wanting to

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ally applicable sales tax including cable but excluding print media); *Regan v. Taxation with Representation*, 461 U.S. at 551 (1983) (noting tax code may deny exemption for lobbying expenses); *Maier v. Roe*, 432 U.S. 474, 466 (1977) (holding Connecticut may choose to pay for child birth but not abortions); *Cammarano*, 358 U.S. at 513 (allowing tax code to exclude lobbying expenses from exemptions even if necessary for business); *Valezquez v. Legal Servs. Corp.*, 164 F.3d 757, 759, 773 (2d Cir. 1999) (allowing some restrictions in legal services grant); *Advocates for the Arts v. Thomson*, 532 F.2d 792, 798 (1st Cir. 1976) (affirming New Hampshire's right to deny art subsidy to magazine for inclusion of filthy poem). *But see supra* note 4 (listing reasons restrictions may be held unconstitutional); *infra* notes 17, 18 (listing benefits with unconstitutional conditions); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (noting benefit may not be denied based on constitutionally infringing basis); *Hannegan v. Esquire*, 327 U.S. 146, 156 (1946) (commenting denial of mail use requires special grounds).

<sup>17</sup> *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 845-46 (1995) (determining University's restriction on funding promotion of religion unconstitutional); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993) (holding school not denying access to otherwise open building based on expression of religious viewpoint); *Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 123 (1991) (criticizing statute requiring accused or convicted criminal's publicity money to be held in escrow as against First Amendment); *Arkansas Writers' Project*, 481 U.S. at 234 (holding tax based on subject matter of magazine violated First Amendment); *FCC v. League of Women Voters*, 468 U.S. 364, 402 (1984) (finding ban on management of public broadcasting stations editorializing violated First Amendment); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552 (1975) (noting city's denial of municipal theater for Hair was prior restraint); *Perry*, 408 U.S. at 598 (finding failure to renew state teacher's contract because of his criticism violated First Amendment); *Sherbert v. Verner*, 374 U.S. 398, 405-06 (1963) (finding denial of benefit unconstitutional because religious belief prohibited Saturday work); *Speiser*, 357 U.S. at 528-29 (noting required oath to not overthrow government for tax benefit unconstitutionally shifted burden of proof); *Hannegan*, 327 U.S. at 158 (condemning as censorship denial of second-class mailing privilege based on public good determination); *Valezquez*, 164 F.3d at 772 (disallowing legal services restriction based on viewpoint); *Bella Lewitzky Dance Found. v. Froyhnmayer*, 754 F. Supp. 774, 783 (C.D. Cal. 1991) (holding compelling grant recipients to sign non-obscenity certificate vague and against First Amendment). *But see supra* note 3 (discussing government's right to define programs); *supra* note 16 (noting examples of upheld limitations).

<sup>18</sup> *See Simon and Schuster*, 502 U.S. at 116-17 (characterizing Son of Sam escrow mandate as burden on free speech); *Arkansas Writers' Project, Inc v. Ragland*, 481 U.S. 221, 227 (1987) (explaining discriminatory tax on press burdens First Amendment); *Southeastern Promotions, Ltd.*, 420 U.S. at 557 n8. (suggesting city's refusal to allow musical in municipal theater acted as warning to other theaters); *Sherbert*, 374 U.S. at 404 (comparing denial of unemployment benefit to fine imposed for Saturday worship); *American Communications, CIO v. Douds*, 339 U.S. 382, 402 (1959) (noting indirect

exercise my constitutional rights, I would receive this benefit."<sup>19</sup> Further, "the government may not deny a benefit to a person because he exercises a constitutional right."<sup>20</sup> The government responds that it is not required to grant any benefits.<sup>21</sup> Furthermore, the government relies on precedent stating that it is allowed to regulate the behavior of recipients acting within the scope of a government program or acting as speakers of a government message.<sup>22</sup>

In determining whether a condition on a benefit infringes on a constitutionally protected right, the courts often examine whether there was an alternate avenue through which the potential recipient could exercise that right.<sup>23</sup> For example, could the potential recipient exercise the

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discouragements have same coercive effects as fine or imprisonment); *Speiser*, 357 U.S. at 518 (contending tax exemption denial acted as penalty); *Bella Lewitzky*, 754 F. Supp. at 780-83 (considering subsidy denial as injury and noting NEA denial impedes ability for private funding). There is a fine line between when a denial is a penalty or just a decision of Congress not to fund a right. See *Speiser*, 357 U.S. at 525 (noting fine line in regulation of speech). Potential recipients who wish to make art outside the limits of a subsidy are in the same position as if the government had offered no subsidy. *Finley*, 524 U.S. at 595 (Scalia, J., concurring). See also *Rust*, 500 U.S. at 202 (recognizing failure to award benefit left recipient with same options as if there were no potential of benefit); *Arkansas Writer's Project Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting) (opining denial of benefit does not have coercive effect); *Harris v. McRae*, 448 U.S. 297, 317, n.19 (1980) (noting refusal to fund right without more is different than penalty); *Maier*, 432 U.S. at 475 (recognizing difference between not paying for exercise of right and interference with right); *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (explaining Congress's lack of obligation to fund lobbying differs from penalty for lobbying). Cf. *supra* note 12 (explaining government need not fund right merely because right constitutional).

<sup>19</sup> See *Simon and Schuster*, 502 U.S. at 116 (observing state holding royalties from book as unconstitutional disincentive on speech); *Perry*, 408 U.S. at 597 (listing benefits Court held could not be declined based upon exercise of constitutional rights); *Sherbert*, 374 U.S. at 404 (recognizing denial of unemployment benefits is same as fine). But see *Regan*, 461 U.S. at 546 (rejecting idea that right is not realized unless subsidized).

<sup>20</sup> *Regan*, 461 U.S. at 545. Accord *supra* note 4 (explaining government may not deny benefits for exercise of constitutional rights); *supra* notes 17, 18 (listing benefit denials found to be unconstitutional). But see *supra* note 16 (describing benefit restrictions found constitutional).

<sup>21</sup> See *supra* note 12 (discussing government need not fund constitutional rights).

<sup>22</sup> See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (recognizing government as speaker may mold message); *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991) (commenting government may make value choice to promote childbirth over abortion); cf. *Maier v. Roe*, 432 U.S. 464, 476 (1977) (noting government's broader power to encourage actions).

<sup>23</sup> See *NEA v. Finley*, 524 U.S. 569, 595-596 (1998) (Scalia, J., concurring) (explaining artists could make disrespectful art but society not obligated pay for it); *Rust*, 500 U.S. at 197 (clarifying unconstitutional conditions placed on speaker rather than on

supposedly, restricted right outside the scope of the program, either through affiliates or individually?<sup>24</sup> In cases where the recipients could still exercise their rights in a manner unconnected with government funding, the court found the benefit not to be conditional and thus the restriction constitutional.<sup>25</sup>

The courts have also examined the government's motives for placing conditions on the receipt of subsidies.<sup>26</sup> If the government cre-

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program). It is permissible for a program to have limitations, however, those limitations must be placed on the program and not on the speakers in a way that effects their behavior external to the subsidized program. *See Rust*, 500 U.S. at 196 (commenting Title X grantees could still engage in abortion activity if outside scope of program); *Regan v. Taxation with Representation*, 461 U.S. 540, 550 (1983) (clarifying case not about lobbying right but whether congress must subsidize lobbying); *Valezquez v. Legal Servs. Corp.*, 164 F.3d 757, 765-768 (2d Cir. 1999) (discussing role of adequate alternate avenues when government restricts rights through benefits). *Accord FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984) (criticizing ban on editorializing for not allowing private funding of editorials); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (condemning denial of unemployment benefits left no choice but to forgo religious observance); *Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 785 (C.D. Cal.1991) (arguing denial of NEA funding had effect of blocking access to alternate channels). In some cases, having access to alternate avenues did not save the restrictions. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1974) (noting government may not justify prior restraint because another forum is available); *Hannegan v. Esquire*, 327 U.S. 146, 150 (1946) (disallowing censorship of second-class mail despite availability of first class mail).

<sup>24</sup> *See supra* note 19 (discussing alternative avenues). This question concerns the legal rather than the practical possibility. *See Rust*, 500 U.S. at 204 (Blackmun, J., dissenting) (condemning majority for allowing viewpoint suppression because it only applied to those needing governmental assistance); *Maher*, 432 U.S. at 483 (Brennan, J., dissenting) (criticizing restriction on abortion payments as form of financial coercion imposed only on poor). "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." *Maher*, 432 U.S. at 483 (Brennan, J., dissenting) (quoting *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring)). *Accord Regan*, 461 U.S. at 553 (Blackmun, J., dissenting) (commenting problem of silencing one speaker not solved by letting another speak).

<sup>25</sup> *See supra* note 20 (observing relationship between alternate access and restriction); *League of Women Voters*, 468 U.S. at 400 (commenting restriction would be upheld if affiliates allowed to operate outside restriction); *Rust*, 500 U.S. at 197 (explaining unconstitutional conditions operate on recipient rather than on subsidized program); *Maher*, 432 U.S. at 474 (limitation of abortion funding did not interfere with constitutional right); *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (observing lobbying was still allowed despite tax exemption restriction); *Legal Aid Soc'y. of Haw. v. Legal Servs. Corp.*, 145 F.3d 1017, 1026 (9th Cir. 1998) (commenting recipient could engage in restricted activity through an affiliate).

<sup>26</sup> *See Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (stressing burdens on viewpoint speech will drive those viewpoints from marketplace); *Leathers v. Medlock*, 499 U.S. 439, 448-49, 452 (1991) (not-

ates a program in an effort to hear citizens' diverse views, as opposed to subsidizing speakers of the government's message, then the government's motives are scrutinized more closely.<sup>27</sup> If, however, the government creates a program to promote one particular ideal, such as child birth, then the demotion of an alternative ideal, such as abortion, is considered incident to the government deciding to fund one program over another program.<sup>28</sup>

If speech or expression is restricted, courts examine whether the government is infringing on the First Amendment.<sup>29</sup> Typically, the fo-

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ing government may not use subsidy to suppress ideas and thus distort marketplace); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (explaining oath requirement for tax break resulted in speech being limited); *American Communications, Ass'n., CIO v. Douds*, 339 U.S. 382, 402 (1950) (questioning whether aim of statute was suppression of dangerous ideas); *Hannegan*, 327 U.S. at 158 (stating normative speech requirement against American ideology). *Cf. Rosenberger*, 515 U.S. at 835 (commenting danger of liberty lies in state's ability to examine publications); *Southeastern Promotions, Ltd.*, 420 U.S. at 563, 564 (Douglas, J., dissenting in part and concurring in result) (cautioning government control of flow of ideas harms culture). *But see* *Advocates for the Arts v. Thomson*, 532 F.2d 792, 798 (1st Cir. 1976) (suggesting danger of government skewing marketplace reduced by subsidy allowing more speech).

<sup>27</sup> *See Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (distinguishing cases of government solicitation of private speech from cases in which people speak for the government); *Valezquez*, 164 F.3d at 770-71 (questioning whether range of case results may be due to government solicitation of private speech). *Legal Aid Soc'y of Haw.*, 145 F.3d at 1028 (commenting program for legal services not intended to encourage private voices). The Federal and New Hampshire art funding statutes give the promotion of private speech as one of the main purposes of the law, however, in both cases, subjective decisions were upheld. *See* 20 U.S.C. § 954 (1990); N.H. REV. STAT. ANN. § 19-A (1965); *Finley*, 524 U.S. at 585 (recognizing content based decisions as inherent in arts funding); *Advocate for the Arts*, 532 F.2d at 795-96 (noting government's right to make case by case determination in arts funding).

<sup>28</sup> *See NEA v. Finley*, 514 U.S. 569, 585 (1998) (recognizing choice of one applicant results in denial of another); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 694 (1998) (Stevens, J., dissenting) (explaining impossibility of subsidizing all speech); *Rust v. Sullivan*, 500 U.S. at 194 (justifying viewpoint discrimination because program funding mutually exclusive); *Maher v. Roe*, 432 U.S. at 481 (noting government funding discretion); *Advocates for the Arts*, 532 F.2d at 795 (noting denied applicant cannot claim suppression just because another artist selected).

<sup>29</sup> *See Leathers*, 499 U.S. at 448-49 (analogizing tax scheme targeting few speakers to content based regulation because both distort idea marketplace); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 564 (1975) (Douglas, J., dissenting in part and concurring in result) (explaining government ability to inhibit ideas harms culture); *Hannegan v. Esquire*, 327 U.S. 146, 157-58 (1946) (noting normative artistic requirements contradict our system). *But see Rosenberger*, 515 U.S. at 829 (recognizing government's necessity to limit forum); *Maher*, 432 U.S. at 479 (reiterating competition for limited public funds justifies state making choices).



rum test is employed when there are concerns that the government is restricting speech through the denial of benefits.<sup>30</sup> This test, however, has an inherent flaw in that discrimination against certain viewpoints, such as certain religious or political party ideology, may hide under the guise of a limited public forum as opposed to an open public forum.<sup>31</sup> This occurs when the Court examines the government's action of excluding a speaker as proof the forum was not open to the public, rather than first examining the nature of the property to determine the forum type.<sup>32</sup>

The Court has long noted that when the government is offering a benefit, its criteria for awarding the benefit should be viewpoint-neutral.<sup>33</sup> Neutrality does not always occur, however, and two issues are

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<sup>30</sup> See *Rosenberger*, 515 U.S. at 829 (discussing forum test's applicability to case at bar); *Forbes*, 523 U.S. at 675 (recognizing candidate debates require forum test). But see *Finley*, 524 U.S. at 585-86 (distinguishing case at bar from prior forum cases). There are three forums in the public forum test: Speakers have the most right in the public forum, which are places traditionally held open for speech; speakers rights are more limited in the limited public forum, where the space is being opened for discussion only on particular topics; finally, speakers have the least rights in the non-public forum, which is all other government property. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992). The *International Soc'y for Krishna Consciousness* court explains that public property traditionally used for expressive activity receives highest scrutiny, public property opened for some of the public or for just some expressive activities has same review standard (sic), and other public property is subject to limited review. *Id.* See also *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) (noting state must show compelling interest). The *Perry* court recognized that a state must show compelling interest before restricting speech in places long devoted to debate and expression. *Id.* The court also noted that in limited forums created by state, any restriction must be narrowly drawn, and for all other public areas the state need only be reasonable in its exclusion. *Id.* See also *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (explaining need to examine nature of forum and conflicting interests for expression in public places).

<sup>31</sup> See *International Soc'y for Krishna Consciousness, Inc.*, 505 U.S. at 695, 697 (1992) (Kennedy, J., concurring) (pronouncing under majority's view any challenge fails because Court examined government's actions rather than forum's status); *United States v. Kokinda*, 497 U.S. 720, 741 (1990) (Brennan, J., dissenting) (commenting forum test intended to preserve free speech used to exclude speech). Brennan also questioned the forum test's continued use. *Id.* *Accord* *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 822 (1985) (commenting free speech should not depend on grace of history or government).

<sup>32</sup> See *infra* note 38 (explaining danger when government action used to determine forum type).

<sup>33</sup> See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (commenting government's inability to regulate speech on content is axiomatic); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-93 (1993) (quoting *Cornelius*, 473 U.S. at 806) (forbidding government from regulating

noted when examining viewpoint neutrality.<sup>34</sup> The first issue is whether the government used objective criteria to determine the allotment of the benefit.<sup>35</sup> The second issue, noted in dissents, is whether the government actually complied with the objective criteria.<sup>36</sup>

The issues surrounding viewpoint neutrality become clouded when the benefit is based on a subjective decision, such as artistic merit.<sup>37</sup> The subjective nature of art subsidies was used as justification

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speech in manner favoring one viewpoint over another); *Simon and Schuster v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 126-27 (1991) (Kennedy, J., concurring) (reviewing prior cases that noted content regulations not allowed); *Rust*, 500 U.S. at 209 (Blackmun, J., dissenting) (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n. of NY.*, 447 U.S. 530, 537 (1980) (noting First Amendment prohibits content based restrictions on viewpoints or entire topics); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 229 (1987) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)) (reiterating government cannot make content based restrictions); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (commenting First Amendment requirement of government neutrality in marketplace of ideas). *But see Simon and Schuster*, 502 U.S. at 127 (Kennedy, J., concurring) (listing few categories which allow or consider content based restrictions). These categories include obscenity, defamation, incitement, or imminent danger. *Id.*

<sup>34</sup> See *supra* note 31 (discussing dangers of forum test); *infra* note 35 (noting need for government neutrality). See also *Kokinda*, 497 U.S. at 751 (Brennan, J., dissenting) (quoting *Cornelius*, 473 U.S. at 825) (criticizing catch-22 of exclusion from forum proves forum is limited public forum); *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 695 (Kennedy, J., concurring) (criticizing lack of objective criteria requirement in determining government's designated purpose for property). See also *International Soc'y for Krishna Consciousness*, 505 U.S. at 695, 697 (Kennedy, J., concurring) (criticizing analyzing government's actions rather than forum's status causes anything to fail).

<sup>35</sup> See *Rosenberger*, 515 U.S. at 839 (noting neutrality respected when government follows neutral criteria); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130, 132-33 (1992) (cautioning against government licensing officials with too much discretion); *Leathers v. Medlock*, 499 U.S. 439, 464 (1991) (Marshall, J., dissenting) (discussing *Regan v. Taxation with Representation*, 461 U.S. 540 (1983)) (noting government properly selectively subsidizing speech according to content-neutral criteria may promote public good); *Pacifica Found.*, 438 U.S. at 770 (Brennan, J., dissenting) (criticizing absence of limits on the FCC's power to censor); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (detailing prior cases condemnation of lack of clear and definite standards); *Lehman*, 418 U.S. at 303 (commenting policies concerning access to advertising on city buses could not be arbitrary or capricious). *But see Advocates for the Arts v. Thomson*, 532 F.2d 792, 796 (1st Cir. 1976) (noting absence of neutrality tradition in public subsidization of speech activities).

<sup>36</sup> See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 686 n.6 (1998) (Stevens, J., dissenting) (detailing how AETC did not exclude all who failed station's own criteria).

<sup>37</sup> See *NEA v. Finley*, 524 U.S. 559, 586 (1998) (explaining Congress cannot legislate with clarity on subjective grants such as excellence or merit); *Advocates for the Arts*, 532 F.2d at 796 (noting judgement requirement in subjective subsidies like art).

in upholding additional criteria that specifically directed decency and respect for American beliefs to be weighed in awarding art subsidies.<sup>38</sup> Similar difficulties occur when the government acts as a broadcaster and thus has its own constitutional right to editorial discretion which necessarily entails subjective determinations.<sup>39</sup>

In addition to the considerations described above, there are often peculiar factors to a case that impact judicial decisions.<sup>40</sup> For example, different topics garner more First Amendment protection than others.<sup>41</sup> Sometimes the nature of the benefit itself requires more subjectivity or restrictions than other benefits.<sup>42</sup> Both of these variations mean counsel would be well advised to know the current trends of the Court and what arguments the Court currently accepts.

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*But see* *Hannegan v. Esquire*, 327 U.S. 146, 157 (1946) (noting art changes from generation to generation, and forcing conformance against our system).

<sup>38</sup> See *Finley*, 524 U.S. at 590 (noting new decency and respect consideration merely adds imprecise consideration to already imprecise award).

<sup>39</sup> See *Forbes*, 523 U.S. at 674 (recognizing necessity of editorial discretion by public broadcasters). *But see* *Rosenberger v. Rectors and Visitors of the Univ. Va.*, 515 U.S. 819, 835 (1995) (cautioning against danger of government evaluating publications to determine if they meet government ideal); *FCC v. Pacifica Found.*, 438 U.S. 726, 766 (1978) (Brennan, J., dissenting) (contending Court's decision allowed majority to keep protected message from minority); *Southeastern Promotions, Ltd.*, 420 U.S. at 564 (Douglas, J., dissenting in part and concurring in result) (noting government content discretion promotes censorship).

<sup>40</sup> See *infra* notes 41, 42 (providing examples of factors such as topic and nature of benefit).

<sup>41</sup> See *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971) (declaring campaigns for political office have highest constitutional protection); *Valezquez v. Legal Servs. Corp.*, 164 F.3d 757, 771 (2d Cir. 1999) (opining legal arguments worthy of greater First Amendment protection than abortion counseling or indecent art); *Chandler v. Georgia Pub. Telecomm. Comm'n*, 917 F.2d 486, 490 (11th Cir. 1990) (Clark, J., dissenting) (advocating political debate should get highest First Amendment protection).

<sup>42</sup> See *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) (noting nature of broadcasting facility necessitates promotion of one viewpoint over another); *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 663 (1994) (finding broadcasts are principle way people get information); *CBS, Inc. v. FCC*, 453 U.S. 367, 401, (1980) (White, J., dissenting) (*quoting* Report and Order: Commission Policy in Enforcing Section 312 (a) (7) of the Communications Act, 68 F.C.C. 2d 1079, 1087-88 (1978)) (declaring political broadcasting as basic element necessary to broadcasting's public interest requirement); *Advocates for the Arts v. Thomson*, 532 F.2d 792, 796 (1st Cir. 1976) (suggesting use limitations on government property not applicable to art subsidies).

## III. THE CURRENT TREND

The current trend of the Supreme Court is to rule against potential recipients and thus often overrule the courts of appeals.<sup>43</sup> Furthermore, these denials are based on a combination of several arguments, including denial of the restriction acting as a penalty, denial of improper motive of the government, denial of non-viewpoint neutrality, considerations of the government's role and incidentally, the subject matter of the limited right.<sup>44</sup> At the same time, dissenting opinions in these cases argue that the majority was cursory in its analysis.<sup>45</sup>

One recent government benefits case considered whether the National Endowment for the Arts (NEA) could take into consideration decency and the diverse beliefs and values of the American public when making award decisions.<sup>46</sup> The U.S. Court of Appeals for the Ninth Circuit found the new consideration void for vagueness, and that the statute utilized viewpoint discrimination on a "traditional sphere of free expression," the NEA.<sup>47</sup> The court of appeals also noted the government, through the NEA, solicited private speech and was not speaking its own message.<sup>48</sup>

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<sup>43</sup> See *Finley v. NEA*, 100 F.3d 671, 683-84 (9th Cir. 1996), *rev'd* *NEA v. Finley*, 524 U.S. 569, 573 (1998); *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 500 (8th Cir. 1996), *rev'd* *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 669, 672 (1998).

<sup>44</sup> See *Finley*, 524 U.S. at 595 (Scalia, J., concurring) (noting recipients could still make indecent or offensive art outside program); *id.* at 587 (explaining government did not misuse guideline to suppress ideas); *id.* at 583-84 (ruling group decision excludes possibility of supporting single viewpoint); *id.* 587-88 (commenting government may do more as patron than as sovereign); *Forbes*, 523 U.S. at 682 (noting jury did not find state-owned television station tried to suppress voice); *id.* at 675 (recognizing candidate debates as different from other broadcasting and thus requiring viewpoint neutrality); *id.* at 676-79 (discussing rights of government as property owner to limit speech).

<sup>45</sup> See *infra* notes 54-59 (discussing the *Finley* dissent); *infra* notes 70-77 (discussing the *Forbes* dissent).

<sup>46</sup> See *Finley*, 524 U.S. at 572-733.

<sup>47</sup> *Id.* at 579 (quoting *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (explaining ruling of appellate court). See also *Finley v. NEA*, 100 F.3d 671, 674 (9th Cir. 1996) *rev'd* *NEA v. Finley*, 524 U.S. 569 (1998) (affirming district court's summary judgement).

<sup>48</sup> *Finley v. NEA*, 100 F.3d at 682. But see *Finley*, 524 U.S. at 586 (quoting *Rosenberg v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (distinguishing art funding from other subsidies because government encouraging only aesthetically pleasing views).

The Supreme Court reversed and upheld the new statute, noting it was not view-point based and that it was a consideration rather than an outright ban.<sup>49</sup> Since the statute was a consideration and not an outright ban, it was not considered a penalty upon those who wished to create indecent or disrespectful art, as they could still do so and technically receive a grant.<sup>50</sup> As in other government benefit cases, the Court reaffirmed the government's right to fund selectively.<sup>51</sup> The Court explained that when the government is acting as a patron, it has more latitude to set restrictions than when it is acting as a sovereign imposing criminal sanctions.<sup>52</sup> The Court admitted the new mandate "adds some imprecise considerations to an already subjective selection process."<sup>53</sup>

The dissent in *NEA v. Finley*<sup>54</sup> criticized the depth of the majority's reasoning.<sup>55</sup> While the majority noted that the new decency and respect standard was merely a consideration, the dissent explained that the NEA was aware funding was jeopardized and would not risk further loss by funding disrespectful or indecent art.<sup>56</sup> Similarly, the dissent noted artists would not risk denial of funding by creating such art.<sup>57</sup> Additionally, the dissent criticized the Court's failure to adequately consider the long-standing rule against viewpoint discrimination especially since the intent of the forum was to encourage free expression.<sup>58</sup> Furthermore, the government motive for censoring speech was transparent, since the

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<sup>49</sup> See *Finley*, 524 U.S. at 587 (noting consideration applied in viewpoint neutral manner); *id.* at 581 (explaining provision was consideration and different from outright ban).

<sup>50</sup> *Id.* at 588 (suggesting consideration would not cause artists to stray from any topics). But see *Finley*, 524 U.S. at 589 (recognizing some artists may feel compelled to conform speech).

<sup>51</sup> See *id.* at 588 (noting government's right to set spending to fund one ideal over another). See also note 28 (explaining mutual exclusivity of government funding).

<sup>52</sup> See *Finley*, 524 U.S. at 587-88 (commenting government role effects power).

<sup>53</sup> *Finley*, at 590 (reviewing new mandate).

<sup>54</sup> 524 U.S. at 569 (1998).

<sup>55</sup> See *supra* notes 56-59 (discussing dissent of *Finley*, 524 U.S. 569 (1998)).

<sup>56</sup> *Finley*, 524 U.S. at 609 (Souter, J., dissenting) (commenting NEA aware of Congressional intent). See also note 18 (referencing *Bella Lewitzky Dance Found. v. Froyhnmayr*, 754 F. Supp. 774 (C.D. Cal. 1991)).

<sup>57</sup> *Finley*, 514 U.S. at 621 (Souter J., dissenting) (explaining artists would not risk funding loss). See also *supra* note 14 (referencing *Bella Lewitzky*).

<sup>58</sup> *Finley*, 524 U.S. 569, 606 (1998) (Souter J., dissenting) (noting statute obviously viewpoint based).

consideration came after several failed attempts at outright bans of constitutionally protected indecent and disrespectful art.<sup>59</sup>

The court of appeals in *Valezquez v. Legal Services Corp.*<sup>60</sup> offered an explanation for the ruling in *Finley*, as well as an explanation for the general atmosphere of conflicting decisions.<sup>61</sup> The *Valezquez* court noted different topics receive different levels of protection.<sup>62</sup> Indecent and disrespectful art has never enjoyed a high level of protection, and the court of appeals suggested this may explain why the Supreme Court did not view the NEA limitation with the outrage that other subject matter limitations may invoke.<sup>63</sup>

Only one year earlier, the U.S. Supreme Court examined whether a state owned broadcaster was required to include all candidates in its televised campaign debates.<sup>64</sup> The court of appeals found the candidate debates were a limited public forum which allowed the government to exclude speakers.<sup>65</sup> The limitation was partially based on the government owned station's view of the candidates' political viability, a criteria that was too subjective in the view of the appellate court.<sup>66</sup> The court of appeals concluded the government made a good faith journalistic decision to exclude the candidate.<sup>67</sup> This case was different, however, because the decision was not made by independent journalists but by the

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<sup>59</sup> *Finley*, 524 U.S. at 603 (Souter J., dissenting) (articulating restrictive intent of new NEA legislation).

<sup>60</sup> *Valezquez v. Legal Services Corp.*, 164 F.3d 757, 759 (2d Cir. 1999).

<sup>61</sup> *Id.*

<sup>62</sup> See *supra* note 41 (discussing different levels of protection for different types of speech); *Valezquez*, 164 F.3d at 771 (arguing legal services are closer to First Amendment than indecent art).

<sup>63</sup> *Valezquez*, 164 F.3d at 771. Cf. *Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring) (listing categories where Court allows content based restrictions; obscenity, defamation, incitement, or imminent danger). See also *supra* note 37 (noting different levels of protection different types of speech receive).

<sup>64</sup> See *Arkansas Educ. Television Comm'n v. Forbes* 523 U.S. 666, 669 (1998) (outlining third party's candidates political debate access).

<sup>65</sup> See *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497, 503 (8th Cir. 1996) (determining forum type of televised debates).

<sup>66</sup> *Id.* at 500 (agreeing with candidate on subjectivity of denial).

<sup>67</sup> See *Forbes v. Arkansas Educ. Television Comm'n.*, 93 F.3d at 505 (explaining while decision in good faith government still one making decision).

government and thus there was no way to oversee these subjective decisions.<sup>68</sup>

The Supreme Court reversed the court of appeals in *Arkansas Educational Television Commission v. Forbes*.<sup>69</sup> The Court held that while candidates were entitled to First Amendment protections, public broadcasters, who also had First Amendment rights, were allowed to exercise viewpoint-neutral journalistic discretion in excluding a candidate from the debate.<sup>70</sup> The Supreme Court, unlike the appellate court, found the debate was a non-public forum and thus the exclusion need only be reasonable and viewpoint-neutral.<sup>71</sup> Once determining the forum was non-public, the Court concluded the government station made a viewpoint neutral and reasonable journalistic decision in excluding the candidate because of his disorganization, lack of financial support, and lack of newsworthiness.<sup>72</sup>

The dissent in *Arkansas Educational Television Commission* criticized the majority for the same reason as the dissent in *Finley*, specifically, that the Court did not fully examine the facts.<sup>73</sup> The dissent provided examples of the lack of consistent standards when deciding who may appear in the debates.<sup>74</sup> For example, some democrat and republican party candidates who failed to meet the supposed objective criteria of the government station participated in the debate, while the third party candidate was excluded when he failed to meet the criteria.<sup>75</sup> The dissent also pointed out that the excluded candidate had a strong political back-

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<sup>68</sup> See *id.* at 505 (noting impossibility of protecting First Amendment from subjective exercise of government power).

<sup>69</sup> *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (finding government's decision to exclude candidate reasonable).

<sup>70</sup> See *Forbes*, 523 U.S. at 669, 674-75 (explaining public broadcaster's speech rights). See also *supra* note 39 (discussing government's own constitutional rights).

<sup>71</sup> See *Forbes*, 523 U.S. at 680 (explaining debate was neither open all persons nor open to all candidates); *supra* notes 29-31 (discussing forum test); *supra* notes 33-36 (noting requirement of viewpoint neutrality).

<sup>72</sup> See *Forbes*, 523 U.S. at 682 (listing reasons Forbes excluded). See also *supra* note 71 (noting forum test and viewpoint neutrality).

<sup>73</sup> See *Forbes*, 523 U.S. at 684-686 (criticizing criteria as lacking standards and ad hoc). See also notes 56-59 (discussing dissent in *NEA v. Finley*, 524 U.S. 569 (1998)).

<sup>74</sup> See *infra* note 76 (describing anomalies in candidate selection).

<sup>75</sup> *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 686 n.5 (1998) (listing democratic and republican candidates who should have been excluded by station and were not).

ground and the debate may have impacted the resulting election.<sup>76</sup> The dissent concluded that precedents should be observed and government should be required to define and apply objective criteria in an area as important as "stag[ing] candidate debates."<sup>77</sup>

#### IV. ARGUMENTS IN SUPPORT OF POTENTIAL RECIPIENTS

Additional government subsidy cases will inevitably come before the Supreme Court as the Second Circuit has already predicted.<sup>78</sup> A staple argument in government subsidy or aid cases is that the criteria for awarding the benefit is not viewpoint neutral.<sup>79</sup> When the government uses non-viewpoint neutral criteria, it sends the message "pariahs need not apply."<sup>80</sup>

The argument that the outsider deserves equal protection needs to be carefully argued and explained.<sup>81</sup> The first step is to define the forum type.<sup>82</sup> After the forum type is established, the criteria for determining admission into the forum should be examined.<sup>83</sup> If the forum and the limitations are not defined in the order of forum type first and limitations second, then the limitations may be used to define the forum.<sup>84</sup> If the forum is defined by the limitations, then almost any forum may be de-

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<sup>76</sup> *Forbes*, 523 U.S. at 684-85 (explaining political importance to excluded candidate).

<sup>77</sup> *Id.* at 695.

<sup>78</sup> See *Valezquez v. Legal Servs. Corp.*, 164 F.3d 757, 776 (2d Cir. 1999) (Jacobs, J., dissenting) (commenting split among appellate court decisions may indicate impending Supreme Court resolution).

<sup>79</sup> See *supra* notes 33-36 (discussing viewpoint neutrality considerations). Cf. *supra* notes 30-31 (discussing forums' impact on neutrality).

<sup>80</sup> *Chicago Acorn, SEIU v. Metropolitan Pier and Exposition Auth.*, 150 F.3d 695, 699 (7th Cir.1998). See *supra* note 18 (detailing how restrictions can penalize speech); *supra* note 26 (warning government should not drive ideas out of marketplace of ideas); *supra* note 29 (listing First Amendment concerns when government limits speech); *supra* notes 31-33 (explaining objective criteria and correlative problems).

<sup>81</sup> See *infra* note 80-85 (describing forum test).

<sup>82</sup> See *supra* note 30 (explaining forum types and considerations of each); notes 31, 34 (noting dangers of forum test if limitations are used to define forum).

<sup>83</sup> See *supra* note 30 (explaining forum types and the considerations of each); notes 31, 34 (noting dangers of forum test if limitations are used to define forum).

<sup>84</sup> See *supra* note 30 (explaining forum types and considerations of each); notes 31, 34 (noting dangers of forum test if limitations are used to define forum).



fined as a limited public forum or a non public forum due to its limited access.<sup>85</sup> The result is the limitations on the subsidy will be viewed with lowered scrutiny by the courts.<sup>86</sup>

A second subsidy case argument is the denial of a subsidy or benefit acts as a penalty on the potential recipient for the exercise of his or her constitutional rights.<sup>87</sup> This includes arguments that potential recipients are denied monies or benefits because of their viewpoints on a topic.<sup>88</sup> The success of this argument depends on the application of the restriction to the applicant's life outside the program.<sup>89</sup> In explaining this issue, counsel should contend how the conditions on the money extend beyond the subsidized program to external aspects of the recipient's life.<sup>90</sup> Further, counsel should argue the subsidized activity can not be separated from the recipient's other business.<sup>91</sup> The limitation acting as a penalty argument has not always been successful and courts are still refining the elements of this argument.<sup>92</sup>

Another argument counsel may bring before the court is based on the government's motives.<sup>93</sup> The argument contends that the government is attempting to censor thought and skew the marketplace of ideas.<sup>94</sup> As discussed in many decisions concerning this argument, attorneys must be careful to know the capacity in which the government is acting.<sup>95</sup> In

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<sup>85</sup> See *supra* note 30 (explaining forum types and considerations of each); notes 31, 34 (noting dangers of forum test if limitations are used to define forum).

<sup>86</sup> See *supra* note 30 (describing different levels of scrutiny for each forum).

<sup>87</sup> See *supra* notes 17-20 (listing various restrictions considered penalties). *But see* note 18 (listing contrary rulings finding various restrictions not penalties).

<sup>88</sup> See *supra* notes 17-19 (listing unconstitutional limitations).

<sup>89</sup> See *supra* notes 17, 23, 25 (detailing how limitations must be placed on program and not on speaker). *Cf. supra* note 24 (criticizing how rationale of limitations on programs operates only against poor).

<sup>90</sup> See *supra* notes 17, 23, 25 (detailing how limitations must be placed on program and not on speaker). *Cf. supra* note 24 (criticizing how rationale of limitations on programs operates only against poor).

<sup>91</sup> See *supra* notes 17, 23, 25 (identifying need to allow affiliates to engage in prohibited activities).

<sup>92</sup> See *supra* note 23 (noting some restrictions failed despite alternate avenues). *Cf. supra* note 24 (explaining alternate avenues argument treats poor disparately).

<sup>93</sup> See *supra* notes 26-28 (discussing improper government motives); note 33 (noting government decisions must be neutral); note 39 (warning of danger of censorship).

<sup>94</sup> See *supra* notes 26-28 (discussing improper government motives); note 33 (noting government decisions must be neutral); note 39 (warning of danger of censorship).

<sup>95</sup> See *supra* notes 24, 35 (explaining when government may influence ideas). *Accord supra* note 23 (explaining impossibility of subsidizing all potential recipients).

some cases, the government is permitted to influence the market place of ideas, for example, when it is speaking.<sup>96</sup>

The censorship argument ties in closely with the first of two considerations in determining which types of subsidy cases to bring to court, specifically, the consideration of the role of the government.<sup>97</sup> If the government is acting as a speaker, it has a right to free speech and may influence the market place of ideas.<sup>98</sup> If the government is acting as sovereign, it is severely limited in its allowable speech restriction.<sup>99</sup> If, however, the government is acting as a patron, then, the standards are more ambiguous and the above arguments of censorship, penalties, and viewpoint neutrality apply.<sup>100</sup> Courts scrutinize the government's actions more closely when the government acts as sovereign, or does not have its own constitutional rights which often make these constitutional challenges more successful for the recipient.<sup>101</sup>

The second consideration pertains to the subject matter of the case.<sup>102</sup> Ironically, counsel representing a potential recipient's free expression may wish to censor.<sup>103</sup> As noted above, different types of speech and different constitutional rights receive different levels of protection.<sup>104</sup> The court of appeals in *Valezquez v. Legal Serv. Corp.*<sup>105</sup>

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<sup>96</sup> See *supra* note 3 (detailing government's right to define its programs); *supra* notes 13, 29 (explaining effect of scarce money and resources); *supra* note 22 (noting government may mold message when it is speaker); *infra* notes 98-101 (discussing role of government). Accord *supra* note 27 (listing different subsidy case results).

<sup>97</sup> See *supra* notes 24, 35 (discussing effect of government's role).

<sup>98</sup> See *supra* note 3 (noting government's right to define programs); notes 22, 27, 24 (discussing different considerations in which government solicits private voices); note 39 (listing situations in which government has constitutional rights).

<sup>99</sup> See *supra* note 17 (listing unconstitutional restrictions); *supra* note 26 (warning government may not skew marketplace of ideas); *supra* note 33 (commenting government must be viewpoint neutral except for specific topic areas).

<sup>100</sup> See *supra* note 13 (noting government cannot subsidize all recipients); *supra* note 16 (listing allowed limitations); *supra* note 17 (listing unconstitutional restrictions); *supra* note 26 (warning government may not skew marketplace of ideas); *supra* note 33 (commenting government must be viewpoint neutral except for specific topic areas).

<sup>101</sup> See *supra* note 17 (listing unconstitutional restrictions); *supra* note 18 (explaining denial is different than penalty); *supra* note 26 (warning government may not skew marketplace of ideas); *supra* note 33 (commenting government must be viewpoint neutral except for specific topic areas).

<sup>102</sup> See *supra* notes 25-35 (discussing effect of subject matter on success in court).

<sup>103</sup> See *supra* note 41 (explaining different levels of protection for speech); *supra* note 42 (explaining some subsidies are different by nature).

<sup>104</sup> See *supra* note 37 (explaining different levels of protection for speech).

questioned whether the sexual and offensive nature of the art involved in the *Finley* case were not a factor in the Court's denial of relief.<sup>106</sup> The same court then lauded the case at bar, *Valezquez*, because it concerned speech involving legal services.<sup>107</sup> Note, though, in *Rust v. Sullivan*,<sup>108</sup> that the Supreme Court did not grant relief in a case involving medical services, and has not ruled on *Valezquez*, involving legal services.<sup>109</sup>

## V. CONCLUSION

Government subsidy cases are an evolving area of law that at least one case has noted will inevitably be raised in the Supreme Court again for further clarification. In some decisions in which facial challenges were brought, the Court noted the need for applied challenges rather than facial challenges before they would examine the law. Counsel bringing an applied challenge should be prepared to show how the limitation is a penalty, how the government's motives are suspect, that the role of the government is as sovereign, that the speech in question is protected and that the limitation is not viewpoint neutral.

A lot of confusion exists in this area, with split decisions in the courts of appeals and the Supreme Court's recent overturning trend. The lower courts are also calling for more definitive explanations of the circumstances in which the government may limit its programs and/or subsidies which impacts an applicant's constitutional speech. Precedent has been less tolerable toward government being able to influence the marketplace of ideas by offering a benefit to one recipient and not another. Recent cases have given the government more discretion when awarding benefits and subsidies.

If this confusion remains, the chilling effect could decrease the amount of speech. The confusion can also limit the opportunities to speak or incentives to speak. If the government is uncertain whether it

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<sup>106</sup> 164 F.3d 757 (1999).

<sup>106</sup> *Valezquez v. Legal Serv. Corp.*, 164 F.3d 757, 771 (2d Cir. 1999). See also *supra* notes 37-38 (listing examples of different subjects treated differently).

<sup>107</sup> See *supra* note 102 (noting the *Valezquez*, 164 F.3d 757 (1999) decision).

<sup>108</sup> 500 U.S. 173 (1991).

<sup>109</sup> See *Rust v. Sullivan*, 500 U.S. 173, 202-03 (1991) (declining to find restriction on abortions or speech on abortions as infringement of doctor-patient relationship); *Valezquez*, 164 F.3d at 759 (determining whether subsidy of legal services could be restricted).

can limit the use of its money or programs, the government may choose to not confer any benefits rather than fund activities or speech it does not support. In either scenario, society loses.

*Victoria Rebecca Whelan*

